fact concerning the kind of vegetation in the area in question and whether the wetlands are significant.

Gifford was not intended to broaden significantly the powers of planning boards. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269, 273 (1980). The guiding principle of Gifford and its progeny is that planning boards are authorized to withhold "ANR" endorsements in those unusual situations where the "access implied by [the] frontage is . . . illusory in fact." Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). We conclude that the existence of interior wetlands, that do not render access illusory, is unlike the presence of distinct physical impediments to threshold access or extreme lot configurations that do. That the use of the wetlands is, or must be, subject to the approval of other public agencies (G. L. c. 131, section 40) does not broaden the scope of the board's powers.

The judgment of the Land Court is affirmed. The plaintiffs' plan should be endorsed "approval under the subdivision control law not required."

In Corcoran, the court decided that a Planning Board cannot deny an ANR endorsement in those instances where other permitting approvals may be necessary before practical access exists from the way to the building site. Therefore, the necessity of obtaining wetlands approval under G.L. 131, Section 40, a Title 5 permit, or insuring the availability of water pursuant to G.L. 40, Section 54 are not relevant considerations when reviewing an ANR plan. However, a Planning Board review can consider extreme topographical conditions as the Court qualified its decision when it noted that the existence of wetlands that do not render access illusory is a different situation than when there exists a distinct physical impediment or unusual lot configuration which would bar practical access.

The court again looked at the wetlands issue in Gates v. Planning Board of Dighton, 48 Mass. App. Ct. 394 (2000), and concluded that the Planning Board was correct in denying ANR endorsement because the existence of wetlands prevented practical, safe and efficient access to the buildable portions of the proposed lots. In this case, the land owner proposed to divide his parcel into twelve lots. One lot had conforming frontage on Milken Avenue, which was a public way. The remaining eleven lots had frontage on Tremont Street, which was also a public way.

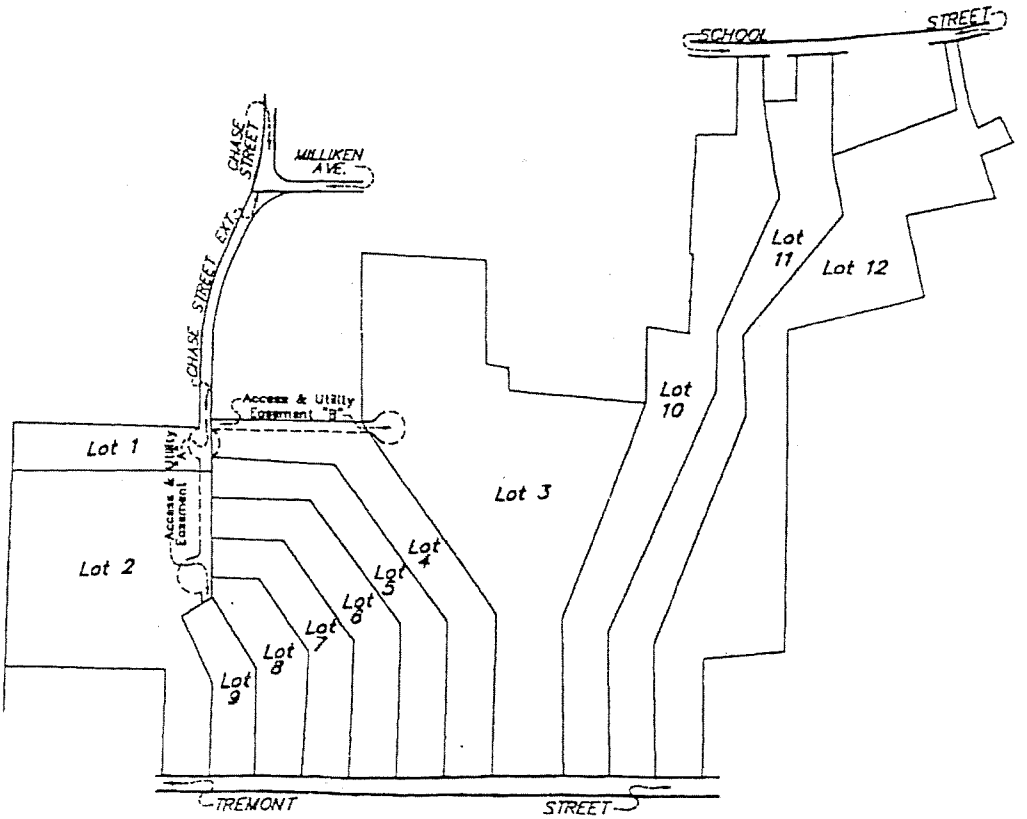
As to the eleven lots on Tremont Street, the front land was wetlands and unsuitable for residential construction. Leaving aside practicality and the necessity of other public approvals, the developer's engineer said access from Tremont Street was theoretically possible. To reach the portions of the lots from Tremont Street where a house could be

built, it would be necessary to build driveways on bridges over the wetlands. In the case of six of those lots the bridges would be about 2,000 feet long.

The developer's professional engineer conceded at trial that approaching the lots from Tremont Street would be an "environmental disaster" as well as an economic calamity. His plan showed alternate access from other points and at those points the frontage was less than the 175 feet required under the Dighton zoning bylaw. Access for eight lots was to be achieved by constructing an extension to Chase Street, which was an existing private way. A common driveway was also proposed with a cul-de-sac for a vehicular turn around.

The court gently reminded the developer that the object of the Subdivision Control Law and the task of the Planning Board is to ensure, by regulating their design and construction, safe and efficient roadways to lots that do not otherwise have safe and efficient access to an existing public roadway. In upholding the ANR denial, the court concluded that the proposed Chase Street extension and common driveways constituted a road system which required approval by the Planning Board under the Subdivision Control Law.

Gates v. Planning Board of Dighton



Is a plan entitled to ANR endorsement if a distinct physical impediment exists that prevents practical access but can be removed at a later date so that each lot would have practical access onto a public way? The court, in Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), shed some light on this issue.

Poulos owned a parcel of land that abutted a paved public way in the town of Braintree. He submitted a plan to the Planning Board requesting an ANR endorsement from the Planning Board. The plan showed 12 lots, each lot having the minimum 50 feet of frontage on a public way as required by the Braintree zoning bylaw. However, there was a guardrail along the street extending for about 659 feet between the paved way and the frontage of eight lots shown on the plan. The State Department of Public Works had installed the guardrail due to the existence of a steep downward slope between the public way and portions of the property owned by Poulos. The Board denied ANR endorsement because the lots had no practical access to the street, and Poulos appealed to the Land Court.

The Land Court judge found that the policy of the State Department of Public Works is to remove guardrails when the reason for their installation no longer exists. Neither State nor local approval would be required for Poulos to regrade and fill his property so as to eliminate the slope. An order of conditions authorizing such filling had been issued to Poulos by the Braintree Conservation Commission. The judge concluded that neither the slope nor the guardrail constituted an insurmountable impediment and found that adequate access existed from the public way to the lots. He based his decision on the fact that there was nothing to prevent Poulos from filling and regrading his property which would result in the removal of the slope and therefore eliminate the need for the guardrail. The Planning Board appealed and the Massachusetts Appeals Court reversed the decision of the Land Court judge. The Massachusetts Supreme Judicial Court allowed further appellate review and agreed with the Appeals Court.

POULOS v. PLANNING BOARD OF BRAINTREE
413 Mass. 359 (1992)

Excerpts:

O'Connor, J. ...

> Planning boards may properly withhold the type of endorsement sought here when the "access implied by the frontage is...illusory in fact." ... The plaintiff argues that the access is not illusory in this case because, as the judge determined, the plaintiff could regrade the slope, and regrading would result in the DPW's removal of the guardrail, which would no longer be needed. The plaintiff also argues that, subject to reasonable restrictions, he has a common law right of access from the public way to

his abutting lots that would require the DPW to remove the guardrail if it were not to do so voluntarily. ...

We conclude, as did the Appeals Court, that c. 41, §§ 81L & 81M, read together, do not permit the endorsement sought by the plaintiff in the absence of **present** adequate access from the public way to each of the plaintiff's lots. It is not enough that the plaintiff proposes to regrade the land in a manner satisfactory to the DPW and that the DPW may respond by removing the guardrail. In an analogous situation, the Appeals Court upheld the refusal of a planning board to issue an "approval not required" endorsement where the public way shown on the plan did not yet exist, even though the town had taken the land for future construction of a public street. The Appeals Court concluded that public ways must in fact exist on the ground" to satisfy the adequate access standard of c. 41, § 81M. Perry v. Planning Bd. of Nantucket, supra at 146, 150-151. While Perry dealt with nonexistent public ways, and this case deals with nonexistent ways of access, the principle is the same. There should be no endorsement in the absence of existing ways of access.

In addition, we reject the argument, based on Anzalone v. Metropolitan Dist. Comm'n, supra, that, at least after regrading, the plaintiff would have a common law right of access that would entitle him to the requested endorsement. It is not a right of access, but rather actual access, that counts. In Fox v. Planning Bd. of Milton, supra at 572-573, the Appeals Court held that abutting lots had adequate access to a Metropolitan District Commission (MDC) parkway, not merely because the abutter possessed a common law right of access, but because, in addition, the MDC had granted the landowner a permit for a common driveway to run across an MDC green belt bordering the parkway. In the present case, the plaintiff has not received such an approval

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Relying on Poulos, the Lincoln Planning Board denied an ANR endorsement in Hobbs Brook Farm Property Company Limited Partnership v. Planning Board of Lincoln, 48 Mass. App. Ct. 403 (2000). Hobbs Brook submitted a five lot ANR plan to the Planning Board. Each lot had at least the 120-foot minimum frontage required by the Lincoln zoning bylaw although the frontage on four lots was partially obstructed by a metal guardrail or concrete Jersey barrier. However, each lot had unobstructed access ranging from twenty-two feet to eighty-seven feet. Hobbs Brook needed curb cuts from the Massachusetts Department of Highways (MDH) because all the lots abutted State Route 2. MDH had advised Hobbs Brook that it would not issue a curb cut permit until the town approved the plan.

The Planning Board denied ANR endorsement on the grounds that (1) access to Route 2 was extraordinarily unsafe and dangerous; (2) the owner had not obtained curb cut permits from the MDH; and (3) guardrails, Jersey barriers, and Cape Cod berms might impede access along the full length of the 120 feet required as frontage. The court decided that none of the reasons stated by the Planning Board justified the denial of the plan. As to the guardrails, Jersey barriers, and Cape Cod berms, those partial obstructions did not have the physical barrier effect described Poulos. As previously noted, in that case there was a guardrail along almost the entire frontage of eight of the twelve lots shown on the plan. There was also a sharp drop in the grade of land behind the guardrail. Here, by comparison, the court concluded that adequate access existed to each of the lots.

> "It is simply not correct, as the planning board argues, that the entire frontage required for a lot under Lincoln's zoning by-law must be unobstructed. The by-law makes no such statement. Moreover, the purpose of the minimum frontage requirement in zoning codes deals with the spacing of buildings and the width of lots as well as access. For purposes of access, it is worth remembering, twenty feet is the minimum frontage required by c.41, s. 81L, although we do not intimate that the MDH or other authority having jurisdiction may not impose a higher standard."

APPROVING ANR LOTS ON SUBDIVISION WAYS

Under the Subdivision Control Law, one method for amending a previously approved subdivision plan is found in MGL, Chapter 41, § 81W, which provides in part that:

> "A planning board, on its own motion or on the petition of any person interested, shall have the power to ... amend ... its approval of a plan of a subdivision ... . All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the ... amendment ... of such approval and to a plan which has been changed under this section."

Another method for amending a previously approved subdivision plan can be found in MGL, Chapter 41, § 81O which provides in part that:

> "After the approval of a plan ... the number, shape and size of the lots shown on a plan so approved may, from time to time, be changed without action by the board, provided every lot so changed still has frontage on a public way or way shown on a plan approved in accordance with the subdivision control law for at least such distance, if any, as is then required ... and if no distance is so required, has such frontage of at least twenty feet."

The process for amending a subdivision plan pursuant to § 81W is the same process that a Planning Board must follow when approving the original subdivision plan. Rather than going through the public hearing process, Section 81O allows a developer/landowner, as a matter of right, to change the number, shape and size of lots shown on a previously approved subdivision plan. A developer/landowner may also submit an ANR plan when changing the number, shape, and size of lots shown on a previously approved subdivision plan. What must a Planning Board consider when reviewing an ANR plan where the proposed lots abut a way shown on a plan that has been previously approved and endorsed by the Planning Board pursuant to the Subdivision Control Law ?

Before endorsing an ANR plan where the lots shown on a plan abut such a way, the court has determined that a Planning Board should consider the following:

1. Are the approved ways built or is there a performance guarantee in place, as required by MGL, Chapter 41, § 81U, that they will be built?

2. Was there a condition placed on the previously approved subdivision plan which has not been met or which would prevent further subdivision of the land?

MGL, Chapter 41, § 81U provides several techniques for enforcement of the Subdivision Control Law. A Planning Board, before endorsing its approval of a subdivision plan, is required to obtain an adequate performance guarantee to insure that the construction of the ways and the installation of municipal services will be completed in accordance with the rules and regulations of the Planning Board. The court has decided that a plan is not entitled to an ANR endorsement unless the previously approved subdivision way shown on the ANR plan has been built or there is a performance guarantee assuring that the way will be built.

In Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980), the Board of Selectmen, acting as an interim Planning Board, approved a 26 lot subdivision. The Selectmen did not specify any construction standards for the proposed ways, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee. Eighteen years after the approval of the subdivision plan by the Board of Selectmen, Richard submitted an ANR plan to the Planning Board. During the 18 year period, the locus shown on the ANR plan had been the site of gravel excavation so that it was now 25 feet below the grade of surrounding land. The Planning Board refused to endorse the plan. The central issue before the court was whether the lots shown on the ANR plan had sufficient frontage on ways that had been previously approved in accordance with the Subdivision Control Law. The court found that to be entitled to the ANR endorsement, when a plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards. Since there was no performance guarantee, Richard's plan was not entitled to ANR endorsement.

A Planning Board, when approving a subdivision plan, has the authority to impose reasonable conditions. A Planning Board may impose a condition which can result in the automatic rescission of a subdivision plan. A Planning Board may also impose a condition which can limit the ability of a developer/landowner to further subdivide the land shown on the plan without modifying or rescinding the limiting condition through the § 81W process. Therefore, in reviewing an ANR plan where the proposed lots abut a previously approved subdivision way, a Planning Board should check for the following:

1. Has the previously approved subdivision plan expired for failure to meet a specific condition?

2. Does the previously approved subdivision plan contain a condition which prevents the land shown on the plan from being further subdivided?

The issue of an automatic rescission of a previously approved subdivision plan was discussed in Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971). In that case, the Planning Board approved a subdivision plan on the condition that the developer complete all roads and municipal services within a specified period of time or else the Planning Board's approval would automatically be rescinded. The Board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant which contained the following language:

> The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two years from date. Failure to so complete shall automatically rescind approval of the plan.

After the expiration of the two-year time period, the landowner submitted a plan to the Planning Board requesting an "approval not required" endorsement. The plan showed a portion of the lots that were shown on the previously approved definitive plan which abutted a way which was also shown on the plan. The landowner's position was that he was entitled to an ANR endorsement since the lots shown on this new plan abutted a way that had been previously approved by the Planning Board pursuant to the Subdivision Control Law. The Planning Board denied endorsement. The court found that the automatic rescission condition was consistent with the purposes of the Subdivision Control Law and that the Planning Board could rely on that condition when considering whether to endorse a plan "approval not required". Since the ways and installation of municipal services had not been completed in accordance with the terms of the conditional approval, the court held that the plan before the Board constituted a "subdivision" and was not entitled to the ANR endorsement. A similar result was also reached in Campanelli, Inc. v. Planning Board of Ipswich, 358 Mass. 798 (1970).

In SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), the Planning Board approved a definitive subdivision plan with the notation stating that "All building units will be detached as covenanted" and a covenant to that effect was executed. At a later date, the landowner submitted a plan for ANR endorsement showing building lots abutting ways that were shown on the previously approved subdivision plan. The lots shown on the ANR plan were of such a size to accommodate a multi-family housing development. The Planning Board denied ANR endorsement.

SMI INVESTORS (DELAWARE), INC. V. PLANNING BOARD OF TISBURY

18 Mass. App. Ct. 408 (1984)

Excerpts:

Armstrong, J. ...

> ... the 1973 [definitive] plan was approved subject to a condition that all dwellings erected on the lots shown thereon be detached. The imposition of that condition was not appealed, and its propriety is not now before us. ...The 1981 [ANR] plan showed the same roads but altered lot lines. The plan also showed that the lots are designed to serve multi-family dwellings. The plaintiff asked the planning board to disregard the proposed use, but this it could not demand as of right.
>
> ... The application for the § 81P endorsement was necessarily predicated on the approval of the 1973 plan, which remained contingent on acceptance of the condition. As the 1981 plan does not contemplate compliance with the condition, it is, in effect, a new plan, necessitating independent approval. We need not consider whether the plaintiff might have been entitled to a § 81P endorsement if each lot shown on the plan had been expressly made subject to the condition on the 1973 plan ... The record in the case before us makes clear that the plaintiff did not seek such a qualified endorsement ... .
>
> It follows that the judge did not err in ruling that the planning board was correct in refusing the § 81P endorsement.

In Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993), the court held that the Planning Board did not modify or waive a condition imposed on a previously approved subdivision plan by endorsing a subsequent plan "approval not required." In Hamilton, the Beverly Planning Board approved a five lot definitive plan on the stated condition that "This subdivision is limited to five (5) lots unless a new plan is submitted to the Beverly Planning Board which meets their full standards and approval." Seven years later, Hamilton, an owner of one of the lots shown on the 1982 definitive plan, submitted an ANR plan to the Planning Board. He wished to divide his lot into two lots which would meet the current lot area and lot frontage requirements of the Beverly Zoning Ordinance. The Planning Board endorsed the plan. Thereafter, Hamilton applied for a building permit to erect a single-family residence on one of the newly created lots. The Building Inspector was made aware of the condition noted on the 1982 definitive plan that had limited the subdivision to five lots. On the strength of that limitation, the Building Inspector declined to issue the building permit. On appeal, Hamilton argued that

the "approval not required" endorsement superseded the limiting condition imposed on the 1982 definitive plan.

HAMILTON V. PLANNING BOARD OF BEVERLY

35 Mass. App. Ct. 386 (1993)

Excerpts:

Kass, J. ...

> Approval of a subdivision plan involves procedures, including a public hearing (G. L. c. 41, § 81T) as well as open sessions of the planning board at which the proposed division of a tract of land into smaller lots is carefully reviewed so as to meet design criteria and certain policy objectives relating to streets (with emphasis on maximizing traffic convenience and minimizing traffic congestion), drainage, waste disposal, catch basins, curbs, access to surrounding streets, accommodation to fire protection and policing needs, utility services, street lighting, and protecting access to sunlight for solar energy. ...
>
> The number of lots in a subdivision has a bearing on those considerations. What might be an adequate access road or waste disposal system for five lots is not necessarily adequate for seven or ten. For that reason a planning board may limit the number of lots in a subdivision. ... If it does so, the board must, as here, note the lot number limitation on the approved plan, which becomes a matter of record. Otherwise, under G.L. c. 41, § 81O, the number, shape and size of the lots shown on a plan may be changed as a matter of right, provided every lot still has frontage that meets the minimum requirements of the city or town in which the land is located.
>
> Under G.L. c. 41, § 81W, a person having a cognizable interest may petition the planning board for modification of an approved subdivision plan. Action by a planning board on such a petition for modification incorporates all the procedures attendant on original approval, including, therefore, a public hearing. Section 81W also provides that no modification may affect the lots in the original subdivision which have been sold or mortgaged.
>
> The provisions built into §§ 81T and 81W, which are designed to protect purchasers of lots in a subdivision and the larger public, would be altogether - and easily - subverted if an approved plan could be altered by the simple expedient of procuring a § 81P "approval not required" endorsement. All that is required to obtain such an endorsement is

> presentation to a planning board of a plan that shows lots fronting on a public street or its functional equivalent, see G.L. c. 41, § 81L, with area and frontage that meet local municipal requirements. The endorsement of such plan is a routine act, ministerial in character, and constitutes an attestation of compliance neither with zoning requirements nor subdivision conditions. ... Restrictions in an approved subdivision plan are binding on a building inspector. ... .
>
> The limited meaning which may be ascribed to a § 81P endorsement and the ministerial nature of the endorsement defeat the argument of the plaintiffs that the endorsement constituted a waiver of the five-lots limitation - prescinding from the question whether the board, for reasons we have discussed, could waive the limitation, thus altering the plan, without a public hearing. ...

As Judge Kass noted in Hamilton, restrictions in an approved subdivision plan are binding on a building official. Specifically, MGL, Chapter 41, § 81Y provides that a building inspector cannot issue a building permit until satisfied that:

> "... the lot on which the building is to be erected is not within a subdivision, or that a way furnishing the access to such lot as required by the subdivision control law is shown on a plan recorded or entitled to be recorded ... and that any condition endorsed thereon limiting the right to erect or maintain buildings on such lot have been satisfied, or waived by the planning board, ...

MGL, Chapter 41, § 81P further provides that a statement may be placed on an ANR plan indicating the reason why approval is not required under the Subdivision Control Law. As was noted by the court in SMI Investors, if a Planning Board believes its endorsement may tend to mislead buyers of lots shown on a plan, they may exercise their powers in a way that protects persons who will rely on the endorsement. Before endorsing a plan "approval not required" where the proposed lots abut a way shown on a previously approved and endorsed subdivision plan, the Planning Board should review the subdivision plan to see if there is any limiting condition which would prevent the land shown on the subdivision plan from being further subdivided. If no such condition exists but there were other conditions imposed, it may be prudent to place a notation on the ANR plan indicating that the lots shown on the plan abut a way which has been conditionally approved by the Planning Board pursuant to the Subdivision Control Law. Hopefully, this notation will alert a building official to review the previously approved subdivision plan to determine if there is any condition which would prevent the issuance of a building permit. If the subdivision way shown on the ANR plan has not been constructed, the Planning Board should check to make sure that there exists a performance guarantee as required by the Subdivision Control Law. If the construction of

such way is secured by a covenant, the Planning Board may want to consider placing a statement on the ANR plan which will alert a future buyer of any lot shown on the plan to the existence of such a covenant.

A Planning Board should check with municipal counsel if there is any question concerning the applicability of the covenant to the lots shown on the ANR plan.

APPROVING ANR LOTS ON EXISTING ADEQUATE WAYS

In determining whether a proposed building lot has adequate frontage for the purposes of the Subdivision Control Law, MGL, Chapter 41, § 81L provides that the proposed building lots must front on one of three types of ways:

> (a) a public way or a way which the municipal clerk certifies is maintained and used as a public way,
>
> (b) a way shown on a plan approved and endorsed in accordance with the Subdivision Control Law, or
>
> (c) a way in existence when the Subdivision Control Law took effect in the municipality having, in the opinion of the Planning Board, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use and for the installation of municipal services to serve such use.

In determining whether a lot has adequate frontage for zoning purposes, many zoning bylaws contain a definition of "street" or "way" which includes the types of ways defined in the Subdivision Control Law. The fact that a lot may abut a way which is defined in the Subdivision Control Law does not mean the lot complies with the frontage requirement of the local zoning bylaw.

Where a zoning bylaw allows lot frontage to be measured along a way which in the opinion of the Planning Board has sufficient width, suitable grades, and adequate construction for vehicular traffic, there must be a specific determination by the Planning Board that the way meets such criteria. In Corrigan v. Board of Appeals of Brewster, 35 Mass. App. Ct. 514 (1993), the court determined that a lot abutting such a way does not have zoning frontage unless the Planning Board has specifically made that determination.

In Corrigan, the Planning Board had given an ANR endorsement to a plan of land showing the lot in question. At the direction of the Land Court, the Planning Board noted on the ANR plan that "No determination of compliance with zoning requirements has been made or is intended." At a later date, the Building Inspector denied a building permit because the lot lacked frontage on a "street" as defined in the Brewster Zoning Bylaw. The Brewster Zoning Bylaw defined a "street" in the following way:

> (i) a way over twenty-four feet in width which is dedicated to public use by any lawful procedure;

(ii) a way which the town clerk certifies is maintained as a public way;

(iii) a way shown on an approved subdivision plan; and

(iv) a way having in the opinion of the Brewster Planning Board sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed uses of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.

The Building Inspector denied the building permit because the lot did not abut a public way which is over twenty-four feet in width as noted in (i) above. The Building Inspector's decision did not discuss whether the definition of street as defined in (iv) above was applicable to the lot in question.

On appeal to the court, Corrigan argued that the previous ANR endorsement by the Planning Board constituted a zoning determination by the Planning Board that the way shown on the plan had sufficient width, suitable grades, and adequate construction as required by the Brewster Zoning Bylaw. Corrigan's argument was that the Planning Board could not have given its ANR endorsement unless the Board determined that the lots shown on the plan fronted on one of the three types of ways specified in the Subdivision Control Law. Since the way shown on the ANR plan was not (a) a public way or, (b) a way shown on a plan approved and endorsed by the Planning Board in accordance with the Subdivision Control Law, Corrigan concluded that the Planning Board must have determined that the way was in existence prior to the Subdivision Control Law and had suitable width and grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land and that determination also constituted the favorable determination by the Planning Board required by the Brewster Zoning Bylaw.

CORRIGAN V. BOARD OF APPEALS OF BREWSTER

35 Mass. App. Ct. 514 (1993)

Excerpts:

Gillerman, J. ...

The argument is appealing. If the Planning Board has in fact decided that a lot has adequate frontage on a "street" under § 81L of the Subdivision Control Law because it is adequate in all material respects for vehicular traffic, then it is

wasteful, if not silly, not to extend that decision to the resolution of the same issue by the same board applying the same criteria under the Brewster zoning by-law.

Previous decisions of this court, nevertheless, have repeatedly pointed out that a § 81P endorsement does not give a lot any standing under the zoning by-law. See Smalley v. Planning Bd. of Harwich, 10 Mass. App. Ct. 599, 603 (1980). There we said, "In acting under § 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision."... Smalley, however, involved a lot with less than the minimum area requirements, ... and we rightly rejected the argument that a § 81P endorsement would constitute a decision that the unrelated requirements of the Harwich zoning code had been met. ...

Another decision of major importance is Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802 (1981). There we held that § 81L is not merely definitional, but imposes a substantive requirement that each lot have frontage on a "street" for the distance specified in the zoning by-law, or absent such specification, twenty feet, and that § 81R gives the planning board the power to waive strict compliance with the frontage requirements of § 81L, whether that requirement is twenty feet or the distance specified in the zoning by-law . We also held in that case that the waiver by the planning board under § 81R was valid only for the purposes of the Subdivision Control Law and did not operate as a variance by the zoning board of appeals under the different and highly restrictive criteria of G.L. c. 40A, § 10. ... . Arrigo, too, is different from the present case: there the criteria for the grant of the § 81R waiver by the planning board were different from the criteria for the granting of a § 10 variance, ... In Arrigo, there was no reason whatsoever to make the action of one agency binding upon the other.

Here, unlike Smalley and Arrigo, the subject to be regulated is the same for both the Subdivision Control Law and the Brewster zoning by-law (the requirement that the lot have frontage on a "street"), the criteria for a "street" are the same for both (a determination of the adequacy of the way for vehicular traffic), and the agency empowered to make that determination is the same (the Brewster planning board). The difficulty, however, is that the judge found - and we find nothing to the contrary in the record before us - that the Brewster planning board never in fact determined that the way relied upon by the plaintiffs was a "street" within the meaning of § 81L; the record is simply silent as to the route followed by the board in reaching its decision to issue a § 81P endorsement. Given the variety of possible explanations, we should not infer what the planning board did - as the plaintiffs would have us do - and certainly we will not guess as to the board's reasoning.

The last sentence of MGL, Chapter 41, § 81P provides that a statement may be placed on an ANR plan indicating the reason why approval under the Subdivision Control Law is not required. Placing a statement on an ANR plan stating the reason for endorsement takes on added importance where a local zoning bylaw authorizes frontage to be measured on a "street" or "way" which in the opinion of the Planning Board provides suitable access. As was noted in Corrigan, in such situations a record must exist that clearly indicates that the Planning Board has made such a determination. Before endorsing such a plan, we would suggest that a Planning Board make a determination that the way shown on the plan provides suitable access and then place a statement on the ANR plan indicating that they have made such a determination.

DETERMINING ANR ENDORSEMENT

In determining whether a plan is entitled to be endorsed "approval under the Subdivision Control Law not required," a Planning Board should ask the following questions:

1. Do the proposed lots shown on the plan front on one of the following types of ways?

   A. A public way or a way which the municipal clerk certifies is maintained and used as a public way.

   Case Notes: Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979) (way must be used and maintained as a public way, not just maintained). Spalke v. Board of Appeals of Plymouth, 7 Mass. App. Ct. 683 (1979) (Atlantic Ocean is not a public way for purposes of the Subdivision Control Law).

   B. A way shown on a plan which has been previously approved in accordance with the Subdivision Control Law.

   Case Notes: Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980) (paper street shown on plan approved by selectmen before subdivision control in community, is not a way previously approved and endorsed under the Subdivision Control Law). Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971) (where condition of approved definitive plan required that construction of ways shown on such plan be completed in two years or definitive plan is automatically rescinded, such ways are not ways approved in accordance with the Subdivision Control Law if two year condition is not met). SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984) (condition of original subdivision plan prevented subsequent plan showing a division of land from obtaining ANR endorsement). Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993) (landowner not entitled to building permit for ANR lot where lot was created in violation of a condition imposed on a subdivision plan which prevented the land shown on subdivision plan from being further subdivided to create additional lots).

C. A way in existence when the Subdivision Control Law took effect in the municipality, which in the opinion of the Planning Board is suitable for the proposed use of the lots.

Case Notes: Rettig v. Planning Board of Rowley, 332 Mass. 476 (1955) (ways which were impassable were not adequate for access and subdivision approval was required).

2. Do the proposed lots shown on the plan meet the minimum frontage requirements of the local zoning ordinance or bylaw?

Case Notes: Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980) (if the local zoning ordinance or bylaw does not specify any minimum frontage requirement, then the proposed lots must have a minimum of 20 feet of frontage in order to be entitled to the ANR endorsement).

3. Can each lot access onto the way from the frontage shown on the plan?

Case Notes: Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979) (limited access highway does not provide frontage and access for purposes of ANR endorsement). McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980) (driveway requirement deprived lots shown on plan of vehicular access to the public way so the lots did not have frontage for the purposes of ANR endorsement).

4. Does the way on which the proposed lots front provide adequate access?

Case Notes: Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983) (a paper street, even though a public way, does not provide adequate access as the Subdivision Control Law requires that a public way be constructed on the ground). Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987) (a public way provides adequate access if it is paved, comparable to other ways in the area, and is suitable to accommodate motor vehicles and public safety equipment). Sturdy v. Planning Board of Hingham, 32 Mass. App. Ct. 72 (1992) (deficiencies in a public way are insufficient ground to deny ANR endorsement). Long Pond Estates Ltd v. Planning Board of Sturbridge, 406 Mass. 253 (1989) (a public way provided adequate access though temporarily closed due to flooding where adequate access for emergency vehicles existed on another way).

5. Does each lot have practical access from the way to the buildable portion of the lot?

Case Notes: Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978) (a plan showing lots connected to a public way with long necks narrowing to such a width so as not to provide adequate access was not entitled to an ANR endorsement). Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269 (1980) (as a rule of thumb, practical access exists where the buildable portion of each lot is connected to the required frontage by a strip of land not narrower than the required frontage at any point, measured from that point to the nearest point of the opposite sideline). Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989) (where no physical impediments affect access from the road to the buildable portion of a lot, practical access exists even though several lots would require regulatory approval for alteration of a wetland). Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992) (existence of a guardrail and downward slope constituted physical impediments so that practical access did not exist to permit ANR endorsement).

ENDORSING ANR PLANS SHOWING ZONING VIOLATIONS

Frequently, Planning Boards are presented with a plan to be endorsed "approval under the Subdivision Control Law not required" where the plan shows a division of land into proposed lots in which:

a. all the proposed lots have the required zoning frontage either on public ways, previously approved ways or existing ways that are adequate in the board's opinion, but

b. one or more of the proposed lots lack the required minimum lot area or the plan indicates other zoning deficiencies.

Since the plan shows zoning violations, can the Planning Board refuse to endorse the plan as "approval not required" as requested by the applicant?

What can a Planning Board do to prevent future misunderstandings regarding the buildability of the proposed substandard lots if they are required to endorse the plan?

Relative to the Planning Board's endorsement, the answer is clear. The only pertinent zoning dimension for determining whether a plan depicts a subdivision is frontage. In Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the Harwich Planning Board was presented with a plan showing a division of a tract of land into two lots, both of which had frontage on a public way greater than the minimum frontage required by the zoning bylaw. The Planning Board refused endorsement since the plan indicated certain violations to the minimum lot area and sideline requirements of the zoning bylaw. However, the Massachusetts Appeals Court decided that the plan was entitled to the Planning Board's endorsement.

Anne Smalley had submitted a plan to the Planning Board for endorsement that "approval under the Subdivision Control Law was not required." The plan showed a division of a tract of land into two lots on which there were two existing buildings, a residence and a barn. The barn and the residence were standing when the Subdivision Control Law went into effect in Harwich. One lot had an area of 14,897 square feet and included the existing residence. The other lot had an area of 20,028 square feet and included the existing barn. Both lots shown on the plan met the minimum 100 foot frontage requirement of the zoning bylaw.

The zoning bylaw required a minimum lot area of 20,000 square feet; thus, the smaller lot containing the residence did not conform to the minimum lot area requirement. The plan also indicated violations as to the minimum sideline requirements of the zoning bylaw. The Planning Board refused to endorse the plan and Smalley appealed to the Superior Court. The judge in

Superior Court annulled the Planning Board's decision to refuse endorsement, and the Planning Board appealed to the Massachusetts Appeals Court.

The Planning Board contended that the zoning violations shown on the plan justified its decision not to endorse the plan as "approval not required." The Planning Board argued that Chapter 41, Section 81M, MGL (which states the general purposes of the Subdivision Control Law) requires that the powers of the Planning Board under the Subdivision Control Law "shall be exercised with due regard ... for insuring compliance with the applicable zoning ordinances or by-laws ...." After reviewing the legislative history of the "approval not required plan," the court decided against the Planning Board.

SMALLEY V. PLANNING BOARD OF HARWICH

10 Mass. App. Ct. 599 (1980)

Excerpts:

Goodman, J. . . .

> In view of the legislative history and judicial interpretation of Section 81P, we do not read that section to place the same duties and responsibilities on the board as it has when it is called upon to approve a subdivision. .... Provision for an endorsement that approval was not required first appeared in 1953, when Section 81P was enacted. Theretofore plans not requiring approval by a planning board could be lawfully recorded without reference to the planning board. The purpose of Section 81P, as explained by Mr. Philip Nichols on behalf of the sponsors of the 1953 legislation, was to alleviate the "difficulty ... encountered by registers of deeds in deciding whether a plan showing ways and lots could lawfully be recorded." ... This purpose is manifested in the insertion by St. 1953, c. 674, Section 7, of G.L. c. 41, Section 81X, which provided - as it now provides -- that; "No register of deeds shall record any plan showing a division of a tract of land into two or more lots, and ways, ... unless (1) such plan bears an endorsement of the Planning Board of such city or town that such plan has been approved by such planning board, ... or (2) such plan bears an endorsement ... as provided in [Section 81P,]," ....
>
> Thus, Section 81P was not intended to enlarge the substantive powers of the board but rather to provide a simple method to inform the register that the board was not concerned with the plan -- to "relieve certain divisions of land of regulation and approval by a planning board ('approval ... not required') ... because the vital access is reasonably guaranteed ...." .... Further, were we to accept the defendant's contention that a planning board has a responsibility with reference to

zoning when making a Section 81P endorsement, it would imply a similar responsibility with reference to other considerations in Section 81M ..., not only "for insuring compliance with the applicable zoning [laws]" but "for securing adequate provision for water, sewerage, drainage, underground utility services," etc. A Section 81P endorsement is obviously not a declaration that these matters are in any way satisfactory to the planning board. In acting under Section 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision.

Nor can we say that the recording of a plan showing a zoning violation, as this one does, can serve no legitimate purpose. The recording of a plan such as the plaintiff's may be preliminary to an attempt to obtain a variance, or to buy abutting land which would bring the lot into compliance, or even to sell the non-conforming lot to an abutter and in that way bring it into compliance. In any event, nothing that we say here in any way precludes the enforcement of the zoning by-law should the recording of her plan eventuate in a violation.

We therefore affirm the judgment. In this connection we note that the lower court has retained jurisdiction though so far as appears nothing remains to be done but to place a Section 81P endorsement on the plan in accordance with the judgment...

A plan showing proposed lots with sufficient frontage and access, but showing some other zoning violation, is entitled to an endorsement that "approval under the Subdivision Control Law is not required." If the necessary variances have not been granted by the Board of Appeals, what can a Planning Board do to make it clear that some of the proposed lots may not be available as building lots? A prospective purchaser of a lot may assume that the Planning Board's endorsement is an approval on zoning matters even though such endorsement gives the lots shown on the plan no standing under the applicable zoning bylaw.

Chapter 41, Section 81P, MGL, states, "The endorsement under this section may include a statement of the reason approval is not required." Court cases have supported the concept that, where a Planning Board knows its endorsement may tend to mislead buyers of lots shown on a plan, the Planning Board may exercise its powers in a way that protects persons who will rely on the ANR endorsement. See Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983). In Bloom v. Planning Board of Brookline, 346 Mass. 278, (1963), the court was presented with plan showing a division of a tract of land into two lots which should have been treated as a subdivision because one of the lots lacked the requisite frontage on a public way. However, it was determined that the Planning Board had properly given an ANR endorsement because a statement had been placed on the plan indicating that the deficient lot did not conform with the zoning bylaw.

If an applicant is unwilling to note on the plan those lots which are in noncompliance with the zoning bylaw, or are otherwise not available as building lots, we suggest that the Planning Board may properly add on the plan under its endorsement an explanation to the effect that the Planning Board has made no determination regarding zoning compliance. Since a Planning Board has no jurisdiction to pass on zoning matters, we would suggest that Planning Boards consider the following type of statement:

1. "The above endorsement is not a determination of conformance with zoning regulations"

2. "No determination of compliance with zoning requirements has been made or intended."

3. "Planning Board endorsement under the Subdivision Control Law should not be construed as either an endorsement or an approval of Zoning Lot Area Requirements."

Hopefully, one of the above statements would have the affect of leading a purchaser to seek further advice. Of course, the Building Inspector should also be alerted.

ANR STATEMENTS AND ONE LOT PLANS

In Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963), the court reached the conclusion that a plan showing the division of a tract of land into two parcels where one parcel was clearly not available for building was not a division of land into two lots which would require Planning Board approval under the Subdivision Control Law.

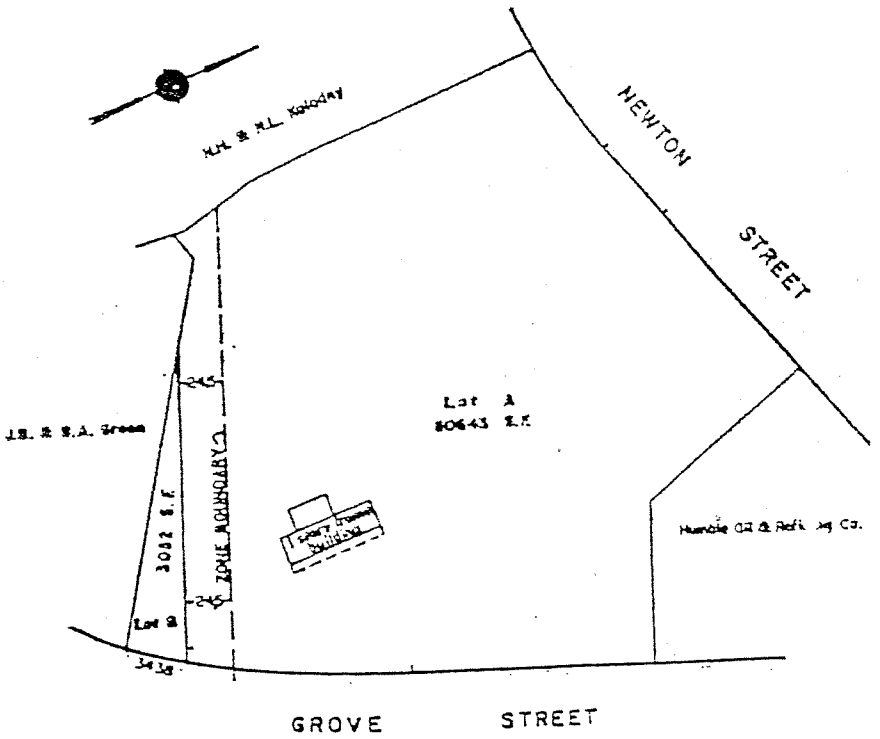
In Bloom, owners of a parcel of land were refused a variance to allow them to build an apartment complex. Their parcel extended more that 25 feet into a single-family zoning district. The zoning bylaw of the town of Brookline contained the following requirement:

> When a boundary line between districts divides a lot in single ownership, the regulations controlling the less restricted portion of such lot shall be applicable to the entire lot, provided such lot does not extend more that 25 feet within the more restricted district.

A plan was submitted to the Planning Board showing two lots. Lot A was a large parcel which only extended 24 feet into the single-family zone. The second lot, which was entirely in the single-family zone did not meet the frontage requirements of the zoning bylaw. A statement was placed on lot B that it did not conform to the Zoning Bylaw. The reason the plan was submitted to the Planning Board was to create a lot which would not be subject to the above noted zoning requirement making the lot available for apartment construction.

Section 81P provides that an ANR endorsement "shall not be withheld unless such plan shows a subdivision." For purposes of the Subdivision Control Law, a "subdivision" is a "division of a tract of land into two or more lots." A "lot" is defined in Section 81L as "an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings." The court determined that the plan was entitled to ANR endorsement since a statement had been placed on the plan making it clear that lot B was not available for the site of building.

Bloom v. Planning Board of Brookline



Section 81P states that the "endorsement under this section may include a statement of the reason approval is not required." Court cases have supported the concept that, where a Planning Board knows its endorsement may tend to mislead buyers of lots shown on a plan, the Planning Board may exercise its powers in a way that protects persons who will rely on the ANR endorsement. For example, in Bloom, the court noted that the Planning Board could have placed thereon or have caused the applicant to place thereon a statement that the lot was not a lot which could be used for a building. Since the Planning Board has no jurisdiction to pass on zoning matters, we would suggest that Planning Boards consider the following type of statement for one lot plans where one or more of the parcels shown on the plan do not meet the frontage requirement of the Subdivision Control Law.

> For the purposes of the Subdivision Control Law, parcel ___ cannot be used as the site for a building.

If a landowner wishes to divide his land in order to convey a portion of his property to another landowner, the following statement might be used.

> Parcel ___ to be conveyed to abutting property owner and is not available as a site for a building.

In Cricones v. Planning Board of Dracut, 39 Mass. App. Ct. 264 (1995), a landowner submitted a plan showing a division of land into three parcels. Two parcels shown on the plan contained a statement that the parcel was not a building lot. The third parcel contained no such statement and also did not meet the frontage requirement as specified in the zoning bylaw. The court found that, in effect, the landowner submitted a single lot plan which did not constitute a subdivision under the Subdivision Control Law and concluded that the plan was entitled to an ANR endorsement because it did not show a division of land into two or more lots. In reaching this conclusion, the court made the following observations:

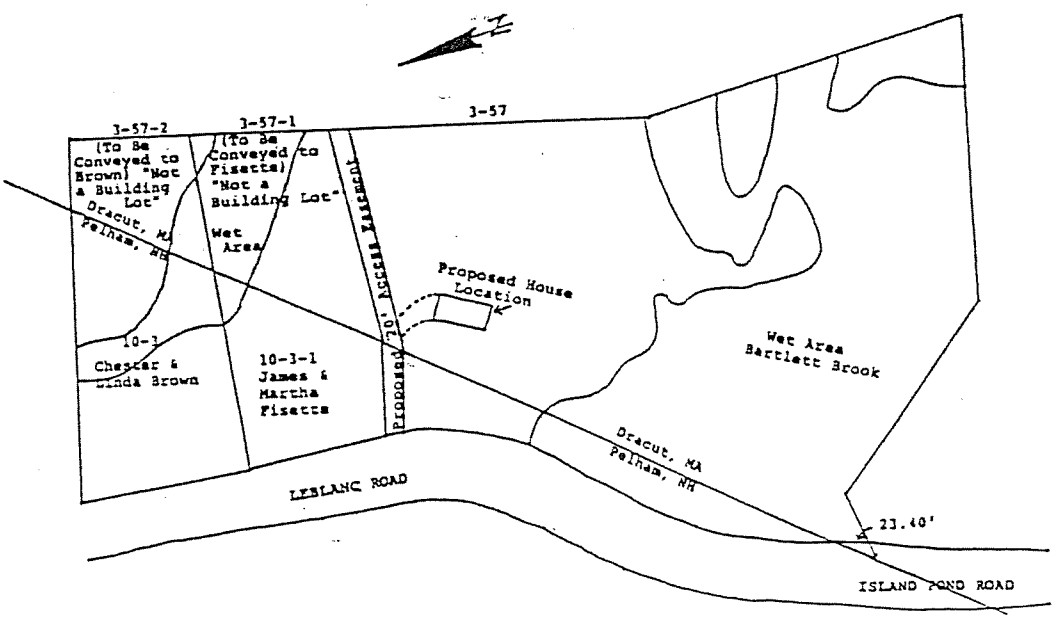
1. In determining whether to endorse a plan "approval not required," a Planning Board's judgment is confined to determining whether a plan shows a subdivision.

2. If a plan does not show a subdivision, a Planning Board must endorse the plan as not requiring subdivision approval.

3. If the Planning Board is presented with a plan showing a division of land into two or more "lots," each of which has sufficient frontage on a way, the Planning Board can properly concern itself with whether the frontage depicted is actual or illusory.

4. If a plan shows a subdivision rather than a single lot under the Subdivision Control Law, the Planning Board can consider the adequacy of the frontage of any lot shown on the plan independent of any variance which may have been granted by the Zoning Board of Appeals.

Cricones v. Planning Board of Dracut



ZONING PROTECTIONS FOR ANR PLANS

The submission of a definitive plan or approval not required plan protects the land shown on such plans from future zoning changes for a specified period of time. A definitive plan is afforded an eight year zoning freeze, while an approval not required plan obtains a three year zoning protection period. A definitive plan protects the land shown on such plan from all changes to the zoning bylaw. An approval not required plan protects the land shown on such plan from future zoning changes related to use.

Presently, Chapter 40A, Section 6, MGL, provides:

> ... the land shown on a [a definitive plan] ... shall be governed by the applicable provisions of the zoning . . . in effect at the time of ... submission ... for eight years from the date of the endorsement of ... approval ... .
>
> ... the use of land shown on [an approval not required plan] ... shall be governed by the applicable provisions of the zoning ... in effect at the time of submission of such plan ... for a period of three years from the date of endorsement ...that approval ... is not required ... .

Whether a plan requires approval or not is, in the first instance, determined by Chapter 41, Section 81L, MGL, which defines "subdivision." If Planning Board approval is not required, the plan may be entitled to a use freeze. The questionable phrase contained in the statute relative to the zoning protection afforded approval not required plans is, "the use of the land shown on such plan shall be governed ... ."

Does this mean that the use of the land shall be governed by all applicable provisions of the zoning bylaw in effect when the plan was submitted to the Planning Board? Or does it mean, as to use, that the land shown on the plan is only protected from any bylaw amendment which would prohibit the use?

In Bellows Farms v. Building Inspector of Acton, 364 Mass. 253 (1973), the Massachusetts Supreme Court determined that the language found in the zoning statute merely protected the land shown on such plans as to the kind of uses which were permitted by the zoning bylaw at the time of the submission of the plan. This decision established the court's view that the land shown on approval not required plans would not be immune to changes in the zoning bylaw which did not prohibit the protected uses.

On March 5, 1970, Bellows Farms submitted a plan to the Planning Board requesting the Board's endorsement that "approval under the Subdivision Control Law is not required." Since the plan did not show a subdivision, the Planning Board made the requested endorsement.

Under the zoning bylaw in effect when Bellows Farms submitted the plan, apartments were permitted as a matter of right. Also, based upon the "Intensity Regulation Schedule" in effect at the time of submission, a maximum of 435 apartment units could be constructed on the land shown on such plan.

In 1970, after the submission of the approval not required plan, the town amended the "Intensity Regulation Schedule" and off street parking and loading requirements of the zoning bylaw. In 1971, the town adopted another amendment to its zoning bylaw which required site plan approval by the Board of Selectmen. If these amendments applied to the land shown on the approval not required plan, Bellows Farms would only be able to construct a maximum of 203 apartment units.

Bellows Farms argued that the endorsement by the Planning Board that "approval under the Subdivision Control is not required" protected the land shown on the plan from the increased zoning controls relative to density, parking and site plan approval for three years from the date of the Planning Board endorsement. However, the town of Acton argued that the protection afforded by the state statute only extended to the "use of the land" and, even though the zoning amendments would substantially reduce the number of apartment units which could be constructed on the parcel, Bellows Farm could still use its land for apartments.

The court agreed with the town of Acton and found that the 1970 and 1971 amendments to the zoning bylaw applied to Bellows Farms' land. In deciding that an approval not required plan does not protect the land shown on such plan from increased dimensional or bulk requirements, the court reviewed the legislative history relative to the type of zoning protection which have been afforded approval not required plans.

In 1960, the Legislature first provided zoning protection for approval not required plans. The Zoning Enabling Act at that time specified:

> No amendment to any zoning ordinance or by-law shall apply to or effect any lot shown on a plan previously endorsed with the words 'approval under the subdivision control law not required' or words of similar import, pursuant ... [G.L. C. 41, S 81P], until a period of three years from the date of such endorsement has elapsed...

In 1961, the Legislature eliminated the above noted provision. However, in 1963, the Legislature again provided a zoning protection. The 1963 amendment contained the same language which presently exists in Chapter 40A, Section 6, MGL, which is:

> The use of land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan ... for a period of three years ... .

The court found that the difference between the 1960 and 1963 protection provisions for approval not required plans was "obvious and significant."

> This is not a case of using different language to convey the same meaning. The use of the different language in the current statute indicates a legislative intent to grant a more limited survival of pre-amendment rights under amended zoning ordinances and by-laws. We cannot ignore the fact that although the earlier statute protected without restriction "any lot" shown on a plan from being affected by a zoning amendment, the later statute purports to protect only "the use of the land" shown on a plan from the effect of such an amendment.

In deciding the Bellows Farms case, the court contrasted the broad zoning protection from all zoning changes afforded subdivision plans versus the more limited protection afforded approval not required plans.

BELLOWS FARMS V. BUILDING INSPECTOR OF ACTON
364 Mass. 253 (1973)

Excerpts:

Quirico, J. .. .

> ... when a plan requiring planning board approval under the subdivision control law is submitted to the board for such approval, "the land shown ... [on such plan] shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of submission of the plan first submitted while such plan or plans are being processed ... [and] said provisions ... shall govern the land shown on such approved definitive plan, for a period of seven [now eight] years from the date of endorsement of such approval ... ." This language giving the land shown on a plan involving a subdivision protection against all subsequent zoning amendments for a seven [now eight] year period is obviously much more broad than the language of ... [the Zoning Act] covering land shown on a plan not involving a subdivision. We have already noted that the ... [Zoning Act] gives protection for a period of three years against zoning amendments relating to "the use of the land," and that this means protection only against the elimination of, or reduction in, the kinds of uses which were permitted when the plan was submitted to the planning board. ...
>
> The 1970 amendment to the zoning by-law did not eliminate the erection of apartment units from the list of permitted uses in a general business district, nor

did it change the classification of the locus from that type of district to any other. It changed the off street parking and loading requirements and the "Intensity Regulation Schedule" applicable to all new multiple dwelling units in a manner which, when applied to the locus, had the effect of reducing the maximum number of units which could be built on the locus from the previous 345 to 203, but that did not constitute or otherwise amount to a total or virtual prohibition of the use of the locus for apartment units. ...

The 1971 amendment to the zoning by-law making the 1970 site plan approval provision applicable to the erection of multiple dwelling units makes no change in the kind of uses which the plaintiffs are permitted to make of the locus. It does not delegate to the board of selectmen any authority to withhold approval of those plans showing a proposed use of the locus for a purpose permitted by the by-law and other applicable legal provisions. Furthermore, the plaintiffs have submitted no site plan to the board of selectmen and we cannot be required to assume that the board will unreasonably or unlawfully withhold approval of such a plan when submitted. ...

The Bellows Farms case established the principle that the protection afforded approval not required plans extends only to the types of uses permitted by the zoning bylaw at the time of the submission of the plan and not to the other applicable provisions of the bylaw. However, the court noted in Bellows Farms that the use protection would extend to certain changes in the zoning bylaw not directly relating to permissible uses, if the impact of such changes, as a practical matter, were to nullify the protection afforded to approval not required plans as authorized by the Zoning Act.

The court further stressed this "practical prohibition" theory in Cape Ann Land Development Corp v. City of Gloucester, 371 Mass. 19 (1976), where the city amended its zoning ordinance so that no shopping center could be constructed unless a special permit was obtained from the City Council. When Cape Ann had submitted its approval not required plan, a shopping center was permitted as a matter of right. The issue before the court was whether Cape Ann was required to obtain a special permit, and if so required, whether the City Council had the discretionary right to deny the special permit. The court held that Cape Ann was required to obtain a special permit, and the City Council could deny the special permit if Cape Ann failed to comply with the zoning ordinance except for those provisions of the ordinance that practically prohibited the shopping center use. The court warned the City Council that they could not decline to grant a special permit on the basis that the land will be used for a shopping center. However, the City Council could impose reasonable conditions which would not amount to a practical prohibition of the use. Later, in Marashlian v. Zoning Board of Appeals of Newburyport, 421 Mass. 719 (1996), a different result was reached when the Massachusetts Supreme Judicial Court did not disturb a Superior Court judge's finding that a landowner was

not required to obtain a special permit. In Marashlian, the use of the locus for a hotel was permitted as a matter of right at the time of the ANR endorsement. At a later date, the zoning was changed to require a special permit for hotel use. The Superior Court judge found that the use of the locus for a hotel was protected as of right and no special permit was required to allow the construction of a hotel.

In a rather muddled decision, the Massachusetts Appeals Court held in Perry v. Building Inspector of Nantucket, 4 Mass. App. Ct. 467 (1976), that a proposed single family condominium development was not entitled to a three year grandfather protection from increased dimensional and intensity requirements. However, the court found that in applying the principle of the Bellows Farms case, relative to protection afforded by an approval not required plan for a use of land which is no longer authorized in the zoning district, a reasonable accommodation must be made by either applying the intensity regulation applicable to a related use within the zone or, alternatively, applying the intensity regulations which would apply to the protected use in a zoning district where that use is permitted. The court further noted that no hard and fast rule can be laid down, and reasonableness of the accommodation will depend on the facts of each case.

In Miller v. Board of Appeals of Canton, 8 Mass. App. Ct. 923 (1979), the Massachusetts Appeals Court held that uses authorized by special permit are also entitled to a three year protection period and that the use protection provisions of the Zoning Act are not confined to those uses which were permitted as a matter of right at the time of the submission of the approval not required plan.

Although it is possible that the Legislature intended to afford freeze protection only to ANR plans which have been recorded, the court, in Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232 (1992) held that nothing in the Zoning Act requires recording of a plan as a prerequisite for a zoning freeze. A landowner applied for a special permit to use a portion of his property for a dental office. The zoning bylaw would have allowed such use, subject to certain restrictions, with a special permit. The special permit application was accompanied by a plan showing the locus with proposed alterations to an existing structure, parking spaces, and other related features. While the Zoning Board of Appeals was reviewing the special permit application, the Planning Board published notice of a public hearing to consider an amendment to the zoning bylaw which would have made the locus ineligible for the special permit. Solely for the purpose of obtaining a zoning freeze, the landowner submitted a plan to the Planning Board seeking ANR endorsement. The plan, which was not the same plan submitted with the special permit application, showed two lots. The plan did not show a subdivision and the Planning Board gave the plan an ANR endorsement. The plan was never recorded.

LONG V. BOARD OF APPEALS OF FALMOUTH

32 Mass. App. Ct. 232 (1992)

Excerpts:

Fine, J. ...

> ... Although it is possible that the Legislature intended to afford freeze protection only to ANR-endorsed plans which are recorded in due course, nothing in G.L. C. 40A § 6, sixth par., requires recording of the plan as a prerequisite for a freeze. Only submission to the planning board and endorsement are referred to in the statute as prerequisites. ... The only proper basis under the statute for withholding an endorsement is that the plan shows a subdivision as defined in G.L. c. 41, § 81L, and Price's plan clearly did not show a subdivision. Application of a subjective test of intent to determine whether to endorse a plan would be inconsistent with the purpose of § 81P and the provision included within that no hearing be held. The test is, therefore, an objective one, and objectively the plan submitted, which showed two adjacent lots with adequate frontage, met the requirement for endorsement.
>
> Second, the abutters claim that, because the plan submitted for ANR endorsement is different from the plan submitted with the application for a special permit, the endorsement did not entitle Price to a zoning freeze. It is true that the lot with respect to which Price sought the special permit is different from the lot with the proposed new boundary line shown on the endorsed plan. All the land with respect to which the special permit was sought, however, was included within the proposed new lot shown on the endorsed plan, and G.L. c. 40A, § 6, sixth par., provides a zoning freeze for "the use of the land shown on [the endorsed] plan" [emphasis added]. The difference in the plans, therefore, did not disqualify Price from benefiting from the freeze.
>
> Third, the abutters argue that the freeze did not apply to the locus because much earlier, in accordance with a 1949 subdivision plan, the lot had been fully developed with a residential structure. Because G.L. c. 40A, § 6, sixth par., refers to freezes of the use of land, they argue, it does not apply to developed land. ... The purpose of the freeze provision is to protect a developer during the planning stage of a building project. ... One may wish to invest in the development of property in accordance with the applicable current zoning regulations whether or not some structure already exist on the property. Price certainly incurred expenses, for example, for the purchase of the property and the preparation of his special permit application, in reliance on the zoning regulations existing at the time he applied for the special permit. The presence of a structure

on the property at the time of that application should not deprive him of the protection the freeze provision was designed to provide.

... The fact that Price's effort to obtain a special permit had almost reached fruition before the zoning by-law was changed makes us comfortable with the result we reach. We recognize, however, in general, the right to obtain a three-year zoning freeze by submitting a plan for ANR endorsement is very broad. As we interpret the statute, it has the potential for permitting a developer, or at least a sophisticated one, to frustrate municipal legislative intent by submitting a plan not for any purpose related to subdivision control and not as a preliminary to a conveyance or recording, but solely for the purpose of obtaining a freeze. Any overbreadth in the protection afforded by the statute, however, will have to be cured by the Legislature.

In Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976), the court found no basis in the language or history of the old section 7A zoning freezes of the Zoning Enabling Act, which are now found in section 6 of the Zoning Act, permitting the freeze provisions to be combined in a "piggy-back" fashion. Wolk had an ANR plan endorsed by the Planning Board prior to a zoning change being adopted which would have applied to his property. Wolk argued unsuccessfully that the ANR zoning freeze protected his land in such a manner so as to allow him to submit, within the ANR freeze period, a preliminary or subdivision plan which would be governed by the provisions of the old zoning bylaw.

Judge Marilyn Sullivan, in one of her more interesting interpretations of the Zoning Act, opined that where a landowner files an ANR plan identical to one previously endorsed, a Planning Board does not have to endorse the new ANR plan while the three year freeze period remains in effect. In Kelly v. Uhlir, (Middlesex) Misc. Case No. 162655, 1993 (Sullivan, J.), Judge Sullivan also noted that any subsequent submission and endorsement of an identical ANR plan does not extend the three year use protection.

ANR AND THE COMMON LOT PROTECTION

The fourth paragraph of Chapter 40A, Section 6, MGL, protects certain residential lots from increased dimensional requirements to a zoning bylaw or ordinance. The first sentence protects separate ownership lots and the second sentence affords protection for lots held in common ownership.

In Sieber v. Zoning Board of Appeals of Wellfleet, 16 Mass. App. Ct. 901 (1983), the Massachusetts Appeals Court determined that the separate lot protection provisions protect a lot if it: 1) has at least 5,000 square feet and fifty feet of frontage; 2) is in an area zoned for single or two-family use; 3) conformed to existing zoning when legally created, if any; and 4) is in separate ownership prior to the town meeting vote which made the lot nonconforming. At a later date, the Massachusetts Supreme Court reached the same conclusion in Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985).

The second sentence of the fourth paragraph of Section 6 which provides protection for common ownership lots was inserted into the Zoning Act in 1979 (see St. 1979, c. 106). As enacted, the "grandfather" protection for common ownership lots provides as follows:

> Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or bylaw shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership.

The Massachusetts Supreme Judicial Court found in Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829 (1985), that the grandfather provision for common ownership lots is not limited to lots which were created by a plan and recorded or endorsed by January 1, 1976. The court's interpretation of the common lot provision provides a unique opportunity to landowners and developers.

In Baldiga, the plaintiff had purchased three lots in the town of Uxbridge. The lots were shown on a plan, dated February 20, 1979, which contained the Planning Board's endorsement "Approval Under the Subdivision Control Law Not Required." At the time of the Planning Board's endorsement, the three lots conformed with the requirements of the zoning bylaw that single-family building lots have a minimum frontage of 200 feet, and a minimum lot area of one acre.

On May 13, 1980, the Town amended its zoning bylaw requiring that single-family building lots have a minimum frontage of 300 feet and a minimum lot area of two acres. In October, 1983, the plaintiff filed building permit applications for the three lots. The Building Inspector denied the applications. The plaintiff appealed to the Zoning Board of Appeals, and the Board denied the plaintiff's appeal because the lots did not meet the 300 foot frontage requirement that had been adopted by the town meeting in 1980.

Both the town and the plaintiff agreed that, at all relevant times, the three lots were held in common ownership, and that the lots complied with the zoning in effect at the time of the Planning Board's endorsement, as well as to the zoning requirements in existence as of January 1, 1976. However, the town contended that the plaintiff's lots were not entitled to "grandfather rights" since the plan for such lots was not "recorded or endorsed" as of January 1, 1976. The plaintiff argued that the lots were entitled to zoning protection since the phrase "as of January 1, 1976," only qualifies the condition that the lots conform with zoning requirements as of that date, and that lots shown on a plan "recorded or endorsed" after January 1, 1976 are entitled to a zoning freeze.

BALDIGA V. BOARD OF APPEALS OF UXBRIDGE
395 Mass. 829 (1985)

Excerpts:

Abrams, J. ...

> We agree with the plaintiff. ... the first part of the second sentence of section 6 entitles an owner of property to an exemption from any increase in minimum lot size required by a zoning ordinance or bylaw for a period of five years from its effective date or for five years after January 1, 1976, "whichever is later." ...We conclude ... that "the statute looks to the most recent instrument of record prior to the effective date of the zoning change." If we were to interpret the "as of January 1, 1976," clause as qualifying the "plan recorded or endorsed" condition, it would negate the effect of the words "whichever is later." As we read the statute, the phrase "as of January 1, 1976," only modifies the condition immediately preceding, that requiring conformity with zoning laws.

We reject the town's contention that the statute's use of the word "conformed," rather than "conforms," to precede the phrase "to the existing zoning requirements as of January 1, 1976," suggests that the plan and the lot must not only conform at some later date to the zoning requirements in effect on January 1, 1976, but also must have been in existence in 1976 and conformed to the zoning requirements at that time. The town's argument ignores the fact that the statutory language consistently uses the past tense to describe all of the conditions needed for a lot to qualify for "grandfather" protection. The word "conformed" is thus appropriate in the context of the statutory provision as a whole and does not specifically signify that the lot or plan must have existed before 1976. ...

The town also argues that the interpretation proposed by the plaintiff would permit the practice of "checkerboarding" as a means of avoiding compliance with local zoning requirements. This result, the town asserts, would contravene the recognition by the new G.L. c. 40A, ... of local autonomy in dealing with land use and zoning issues. However, the specific purpose of the disputed sentence ... was to grant "grandfather rights" to owners of certain lots of land. If we accept the town's interpretation, the ability to checkerboard two or three parcels would be eliminated as of January 1, 1976. But there also would be a substantial reduction in "grandfather rights," a result which is inconsistent with the general purposes of the fourth paragraph of section 6, which is "concerned with protecting a once valid lot from being rendered unbuildable for residential purposes, assuming the lot meets modest minimum area ... and frontage ... requirements... .

We thus conclude that the second sentence of the fourth paragraph of G.L. C. 40A, s. 6, does not require that the plan of the lot in question be recorded or endorsed before January 1, 1976. We also conclude that for lots to be entitled to a five-year exemption from the requirements of a zoning amendment, pursuant to the second sentence of the fourth paragraph of G.L. C. 40A, s.6, the plan showing the lots must have been endorsed or recorded before the effective date of the amendment.

Through the years, one prime concern of the Legislature has been to protect certain divisions of land from future increases in local zoning requirements. Zoning protection for subdivisions and non-subdivision plans has always been measured from the date of the Planning Board's endorsement. However, the common ownership freeze runs from the effective date of the zoning amendment and not from the date the Planning Board endorsed the plan.